PHIL J. HILLBERRY

IBLA 76-210 Decided March 31, 1976

Appeal from a decision of Administrative Law Judge Robert W. Mesch dismissing an appeal from the partial rejection of a grazing license application Wyoming 1-75-1 (World District).

Affirmed as modified.

1. Grazing Permits and Licenses: Appeals -- Rules of Practice: Appeals: Failure to Appeal

   Appellant's earlier failure to protest and appeal a decision rejecting his challenge to another grazier's base property commensurability rating, bars him from appealing a subsequent decision rejecting an application containing the same challenge.

2. Grazing Permits and Licenses: Adjudication -- Grazing Permits and Licenses: Base Property (Land): Generally

   An application for grazing privileges based on newly-discovered past grazing qualifications is properly rejected when licenses and permits have been issued for more than 3 consecutive years based on the allotment adjudication from which the application at issue seeks to deviate. 43 CFR 4115.2-1(e)(13)(i).

3. Grazing Permits and Licenses: Appeals -- Regulations: Applicability -- Rules of Practice: Appeals: Generally

   A district manager's failure to hold an Advisory Board meeting on a grazing applicant's protest is mooted by a subsequent regulatory amendment terminating graziers' rights to an Advisory Board meeting on

protests. In any event, the case would not be remanded for such a meeting when there is no prejudice because the applicant is foreclosed by the grazing regulations from the possibility of prevailing on his protest.

APPEARANCES: Robert A. Gish, Esq., of Zaring & Gish, Basin, Wyoming, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Phil J. Hillberry has appealed from the decision of Administrative Law Judge Robert W. Mesch which dismissed his appeal from a decision of the Worland District Manager, Bureau of Land Management, rejecting his application to graze 60 cattle in common with the LU Sheep Company in T. 47 N., R. 97 W., 6th P.M., Wyoming.

By application for grazing privileges dated October 23, 1974, appellant requested 1,495 animal unit months (AUMs) in the Wagon Hound, Coal and Buffalo Creek allotments, and 60 cattle in common with the LU Sheep Company. By decision dated December 12, 1974, the District Manager rejected the application for the 60 cattle in common with the LU Sheep Company on the grounds: (1) that such an award would be in excess of the applicant's qualifications (43 CFR 4110.0-5(k)), in excess of range capacity (43 CFR 4115.2-1(e)(3)), and outside the applicant's adjudicated use area (43 CFR 4111.3-2(c)); (2) that the District Advisory Board had considered and rejected the applicant's request after a protest meeting, and the District Manager had concurred in the rejection by decision dated February 4, 1974; and (3) that the request for cattle use in common had already been rejected, and the rejection affirmed, in Phil Hillberry, 8 IBLA 428 (1972).

As provided by 43 CFR 4115.2-3, Mr. Hillberry appealed the District Manager's decision to the Hearings Division, asserting two grounds for error. First, he argued that he had recently discovered an old license his predecessor in interest held for use in common with LU Sheep Company, and that the prior Board decision could not have adjudicated rights based on this license because it was not discovered until after resolution of the prior appeal. He argued that the LU Sheep Company was not commensurate for the privileges awarded it, and that he is, based in part on the newly-discovered prior license. Second, he argued that he was denied his right under 43 CFR 4115.2-1(a)(4) (1974) to a protest meeting before the District Advisory Board in connection with the February 4, 1974, decision.

The District Manager answered the appeal with a dismissal motion. It reiterated the grounds for rejection of the grazing

license application, and argued that no Advisory Board meeting was required because this Board had conclusively decided the issues raised in the protest in its 1972 decision.

In response to a request for information by the Administrative Law Judge, appellant argued that the Board's 1972 decision could not foreclose the present appeal because neither appellant's predecessor's license in common with the LU Sheep Company, nor the impropriety of the LU Sheep Company's commensurability rating, were then known to appellant.

By order dated August 14, 1975, the Administrative Law Judge granted the Bureau's dismissal motion. He ruled that the Board's 1972 decision, Phil Hillberry, supra, controlled this appeal, and that appellant's right to assert the newly-discovered license was lost by virtue of 43 CFR 4115.2-1(e)(13), inter alia. The Administrative Law Judge also held that appellant's failure to appeal the February 1974 decision of the District Manager barred him from relitigating the issues there decided. 43 CFR 4.470(b). On the second issue on appeal, the Administrative Law Judge ruled that appellant's "right" to a protest meeting was terminated by regulatory amendments adopted on June 17, 1975, 40 F.R. 25454 (1975), and that a remand under the old regulations would be superfluous since the District Manager was and is not bound by the recommendations of his District Advisory Board. 43 CFR 4115.2-1(a)(4) (1974); 43 CFR 4115.2-1(c) (1975).

In this appeal, Mr. Hillberry argues that neither the prior Board decision nor the February 1974 decision adjudicated the issue in this appeal, since he did not discover his predecessor's old license for 60 cattle in common with the LU Sheep Company until July 1974. Further, he argues that the Bureau violated its own regulations in holding LU Sheep Company to be commensurate for its authorized use, and that the Bureau should reduce LU Sheep Company's allotment and reallocate it among the other commensurate graziers in the district. He also maintains that since he was entitled under the regulations to a protest meeting of the District Advisory Board at the time it was denied, he is still entitled to one, notwithstanding the intervening regulatory amendment.

[1] Regulation 43 CFR 4.470(b) provides that a grazing applicant who fails to protest or appeal a District Manager's decision shall be barred from thereafter challenging the matters adjudicated. Appellant's application of November 14, 1973, included a request for 300 cattle (1,550 AUMs) in the LU Sheep Company allotment. It stated, "By this application I ask the Advisory Board to review the allocation of Federal Grazing Privileges and Commensurability of

LU Sheep Company * * *. The LU Sheep Company have never been Commensurate for Privileges granted." It was this application which was rejected by the District Manager's decision of February 4, 1974.

Appellant's failure to protest or appeal this rejection of his application for privileges in the LU Sheep Company's allotment means that the issue of LU Sheep Company's qualifications has been decided finally as against him. 43 CFR 4.470(b). It is appellant's inaction and the operation of the cited regulation that foreclose this issue to him, however, not the Board's decision in Phil Hillberry, supra. The Board did not, on this record, then have before it any challenge to LU Sheep Company's commensurability. 1/ To this extent the decision below is modified.

[2] Appellant's application for privileges in common with LU Sheep Company was based on his discovery of his predecessor's 1936 license for the same privileges. The 1973 application for privileges, and the application treated in the 1972 decision of this Board, asserted rights derived from the "Benson privileges." Thus, appellant is not barred by 43 CFR 4.470(b) 2/ on the issue of qualifications derived from his predecessor's 1936 license, nor does Phil Hillberry, supra, render the issue res judicata, as the decision appealed from indicates.

The grazing regulations governing allotment adjudications, however, were correctly applied below in the rejection of his application for additional privileges. Regulation 43 CFR 4115.2-1(e)(13)(i) provides in relevant part:

> No readjudication of any license or permit * * * will be made on the claim of any applicant or intervener with respect to the qualifications of the base property * * * or seasons of use of the Federal range allotment where such qualifications or such allotment has been recognized and license or permit has issued for a period of three consecutive years or more, immediately preceding such claim.

1/ Exhibits A and B submitted with his current appeal to this Board indicate that the possibility of LU Sheep Company's lack of commensurability was not known to appellant or the Advisory Board members until after this Board's decision (December 21, 1972).

2/ Appellant's rights, if any, derived from the 1939 license were not "matters adjudicated" in the February 4, 1974, decision, within the meaning of 43 CFR 4.470(b).

The regulation bears no exception for newly-discovered, newly-asserted qualifications. The passage of more than 3 years since the 1964 allotment adjudication cited by the District Manager in rejecting the portion of the application at issue here bars the assertion of additional base property or use qualifications, whether lost or newly-acquired. See Mildred Carnahan, 10 IBLA 150, 153 (1973); Jack G. Taylor, A-31014 (June 25, 1969); Western States Cattle Co., A-30572 (October 10, 1966); W. Dalton LaRue, Sr., A-30391 (March 16, 1966).

[3] The record indicates that the District Manager did not refer appellant's protest of the rejection decision to the Advisory Board because it would serve no purpose, as he felt bound by this Board's decision in Phil Hillberry, supra. The Administrative Law Judge held that appellant was not entitled to an Advisory Board protest meeting for the same reason, as well as the fact that the right to such a meeting was repealed by a regulatory amendment subsequent to the alleged error, 40 F.R. 25454 (1975). We affirm the Judge's denial of the request, but modify the basis for the rejection as follows.

The Department of the Interior generally does not apply regulatory changes to pending applications where the change imposes an added burden on the applicant or removes an existing right, and does not adversely affect the rights of others or the United States. Norman H. Nielson, 72 I.D. 514, 517 (1965); Gilbert V. Levin, 64 I.D. 1 (1957). However, even though the procedure then in effect was not followed, the procedure is no longer in effect. One does not have a vested right to a procedure revoked under competent authority.

In any case, the Department will not remand a case where the remand will serve no purpose. "Reversible error is that which reasonably might have prejudiced the party complaining." Elmer A. Swanson, 10 IBLA 33, 39 (1973). In Swanson, the Board reversed and remanded a District Manager's failure to call an Advisory Board meeting for initial consideration of a grazing application, as required by regulation. This Board pointed out that although the District Manager had the discretion to ignore the Advisory Board's recommendation, the appellant was entitled to the meeting on the possibility his case might prevail.

In this case, however, appellant could not prevail on remand, for the reasons discussed above: appellant's protest against LU Sheep Company's commensurability was finally decided against appellant with the February 4, 1974, decision (43 CFR 4.470(b)); and appellant's application for privileges beyond those granted in the 1964 allotment adjudication was barred by 43 CFR 4115.2-1(e)(13)(i). Further, favorable action on appellant's protest by the Advisory Board was precluded by 43 CFR 4115.2-1(e)(13)(i). Thus, we deem

the District Manager's failure to call an Advisory Board meeting on appellant's protest non-prejudicial and we affirm the Administrative Law Judge's denial of his request for such a meeting.

We wish to point out that while appellant is currently foreclosed, for the reasons discussed above, 3/ from pursuing his grievance against the disposition of the LU Sheep Company allotment, the Bureau is authorized to consider on its own motion the question of LU Sheep Company's commensurability and the base property transfers, if it deems appellant's, or other graziers' allegations (see Ex. B attached to appellant's brief) sufficient to merit inquiry. 43 CFR 4115.2-1(e)(13)(ii). Grazing privileges long recognized will not be canceled unless there is convincing evidence that the base property was not qualified or that approval of the transfer of base property was clearly erroneous. See Bert Smith, 66 I.D. 1, 3 (1959); Earl C. Presley, 60 I.D. 290, 292-93 (1949). This standard is by way of maintaining the stability of grazing rights on the public domain (W. Dalton LaRue, Sr., supra), but it is not to be construed as a recommendation against full examination and treatment of alleged errors in the granting of grazing privileges.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Frederick Fishman
Administrative Judge

We concur:

Joan B. Thompson
Administrative Judge

Martin Ritvo
Administrative Judge

3/ Appellant is also precluded by 43 CFR 4115.2-1(e)(9). In view of our disposition of the case, it is unnecessary to discuss this matter.